Sac and Fox Nation
Gaming Commission

P.O. Box 1086 Shawnee, OK 74802

December 3, 2007

VIA HAND DELIVERY

Comments on Facility Licensing Regulations
National Indian Gaming Commission
1441 L Street, N.W.
Washington, DC 20005
Attn: Jerrie Moore, Legal Assistant

Re: Comments on Proposed Facility Licensing Regulations

Dear Ms. Moore:

On behalf of the Sac and Fox Nation, we provide the following comments on the NIGC's proposed regulations governing facility licensing, at 25 C.F.R. Parts 502, 522, 559 and 573.

I. The Comment Period Must Be Extended

As discussed below, the current draft of the proposed rule would impose far reaching requirements that threaten the core aspects of tribal sovereignty. Although likely not the Commission's intent, the proposed rules would dictate that tribes must enact positive law, and then authorize the NIGC to determine whether that law is adequate. Such a requirement would be a direct affront to the sovereign right of tribes to make their own laws and be ruled by them. If the Commission insists on pursuing such a dramatic course, it must at the very least provide additional time for comment from tribes.

II. The Environmental and Health and Safety Requirements Are Unjustifiable

As drafted, the proposed new environmental and health and safety provisions would dictate that tribes must exercise their sovereignty to enact positive law, and then grant the NIGC the right to judge the adequacy of that law. Although the NIGC states in the preamble to the proposed rule that tribal commenters have "misconstrued" these provisions as requiring tribes to enact law, that is in fact what the proposed rule would do. This is far beyond what Congress authorized in the Indian Gaming Regulatory Act (IGRA), and is legally unsupportable. We urge the NIGC to take another careful look at these provisions and revise its proposal to delete this requirement.

The IGRA requires that tribal gaming ordinances ensure that "the construction and maintenance of the gaming operation, and the operation of that gaming is conducted in a manner that adequately protects the environment and the public health and safety." 25 U.S.C. § 2710(b)(2)(E). What it does not require, or authorize the NIGC to require, is that tribes must enact specific laws setting environmental and public health and safety standards for their gaming operations. But that is precisely what the proposed regulations would do.

(405) 275-4700 ▫ Fax: (405) 878-4728

The proposed regulations would require tribes to provide an attestation certifying that by issuing a facility license: (1) the tribe has identified the environmental and public health and safety laws applicable to their gaming operation; (2) the tribe is in compliance with those laws; and (3) the tribe has ensured that the "construction, maintenance and operation of the gaming facility is conducted in a manner than protects the environment and public health and safety." *See* § 599.5(a) (proposed). In addition, the tribe would have to provide a document listing "all laws, resolutions, codes, policies or procedures identified by the tribe as applicable to its gaming operations," other than federal laws, in the following areas: emergency preparedness, fire suppression, law enforcement, security, food and potable water, construction and maintenance, hazardous materials, sanitation (solid waste and wastewater), and other local laws adopted in light of local climate, geography, and other conditions applicable to tribal gaming facilities, places or locations. *See* § 559.5(b) (proposed). The NIGC appears to presume that in order to meet the IGRA's environment, health and safety requirement, the tribe needs to adopt laws.

Tribes may ensure that their facilities comply with IGRA's own public and safety requirement in any number of ways. They may adopt industry standards through a gaming ordinance, they may adopt standards through a compact, they may enact specific laws adopting such standards, they may adopt state laws as their own which provide such standards, or they may simply follow industry standards as a matter of practice. All of these approaches are authorized under the IGRA.

The proposed regulations would go much farther than IGRA allows, however. If a tribe currently does not have laws in any one of these areas, the regulations would require tribes to adopt such laws. That is to say, the NIGC's regulations would require tribes to enact laws in areas at the core of tribal sovereignty, (i.e., public health, safety, the environment, and law enforcement) to meet the attestation requirement.

We recognize that this may not have been the NIGC's intent, and that the NIGC states in the preamble that this is a misconstruction of the proposal: "[t]he requirements for environmental and public health and safety certifications and lists of laws appear to have been misconstrued as the regulations do not require tribes to adopt any specific laws or send in all of their laws, but are meant to keep the NIGC current on the status of the tribes' laws." 72 Fed. Reg. at 59045. Elsewhere in the preamble, however, the NIGC recognizes that in order to comply with the regulations, tribes that do not have such laws will have to enact them: "[t]he Commission believes that tribes must have some form of basic laws in the following environmental and public health and safety areas. . . ." In assessing the burden on tribes in complying with the rule, the NIGC recognizes that "if a tribe does not have laws in one of the enumerated areas, it may require employment of an attorney or other specialist to research other laws in this area and may require the attorney to draft tribal law if the tribe opts not to adopt a uniform code or law of another jurisdiction." 72 Fed. Reg. at 59049. In the NIGC's own words, then, if a tribe lacks law in one of the areas covered by the new rule, it will either have to adopt law from another jurisdiction or adopt its own.

This proposal goes well beyond the agency's statutory authority in the IGRA, and strikes at the heart of tribal sovereignty. The NIGC simply has no authority to mandate that sovereign tribal governments enact such laws.

Even if it did have such authority, the NIGC has not presented a credible case for the need for these standards. The NIGC presents no credible evidence that tribal gaming facilities are deficient in meeting the IGRA's environment and health and safety requirement, and therefore lacks any justification for this proposal.

Moreover, the proposed standards are vague, subjective and outside the agency's expertise. It is entirely unclear whether and how a tribe's existing environmental and public health and safety program submitted to the NIGC would be reviewed by the NIGC. These standards would place the NIGC in a position of potentially usurping the role of federal agencies such as the EPA in those areas already governed by federal statute, and state agencies, to the extent they have been granted civil jurisdiction in these areas through compacts. Moreover, given the agency's lack of expertise in the area of environmental law, any determination it makes with regard to these proposed standards is unlikely to be given any deference by a court of law. Finally, these requirements would impose a significant economic burden on tribes with limited budgets, which may find it difficult if not impossible to staff a host of new programs required to implement new laws in each of these areas.

III. The Indian Lands Provisions are Improved, But Would Still Impose Needless Burdens on Tribes and the NIGC

The proposed Indian lands provisions are somewhat improved over the previous drafts the NIGC has circulated for comment, but still impose significant burdens on tribes and the NIGC. Under the proposed rules, tribes would have to provide the NIGC with (1) the name and address of the property; (2) a legal description of the property; (3) the tract number for the property as assigned by the BIA, or if not maintained by the BIA a copy of the trust or other deed or an explanation as to why such documentation does not exist; and (4) if not maintained by BIA, documentation of the property's ownership. *See* § 559.2 (proposed). Tribes would also have to issue a separate facility license for each gaming locations every three years and submit a copy of all of their facility licenses to the NIGC within 30 days of issuance. The regulations governing new gaming facilities would be even more burdensome, since tribes would be required to submit to the NIGC a notice that they are simply considering issuing a facility license for a new gaming facility at least 120 days before opening.

The proposal goes far beyond the requirements of the IGRA, which requires simply that tribes issue licenses for their gaming facilities, and that tribes conduct gaming on Indian Lands. Under the IGRA, tribes are required to issue facility licenses only once and are not required to notice NIGC in advance.

As an initial matter, the NIGC has not demonstrated that the current system of tribal licensing is inadequate. Tribes are the primary regulators under the IGRA, and tribes should be

able to continue to issue their own licensing certificate without additional requirements from the NIGC. The NIGC appears to have proposed these standards in order to "populate" an Indian lands database that was suggested by the Office of Inspector General for the Department of the Interior in September 2005. Populating such a database may have several unintended consequences that the NIGC may not have fully considered.

As the NIGC recognizes, tribal information submitted to the NIGC as part of its licensing process under the new regulations would potentially be subject to Freedom of Information Act requests by tribal opponents. Populating a database with such information could lead to numerous FOIA Requests and frivolous claims by tribal opponents that the NIGC would then have to spend valuable resources addressing. We do not believe that it is in the best interests of tribes or the NIGC to create a new flashpoint for disputes to be centered at the NIGC.

We object to the requirement that tribes submit notice to the NIGC that they are *considering* issuing a facility license for a new gaming facility. It appears that this new regulation is intended to give the NIGC time to react and potentially object to the opening of new facilities, and may also lead to frivolous claims being filed by tribal opponents. It is highly objectionable that the NIGC could forestall the opening of a new gaming facility or order its closure simply because it failed to received six months' prior notice thereof and despite otherwise proper licensing by the tribes.

Finally, we note that while the NIGC has improved the proposal by removing many of the most objectionable certification requirements it specifically listed in previous drafts, the proposed rule would grant the NIGC unfettered discretion to request any such information from any tribe at any time. See 25 C.F.R. Part 559.7 (proposed). To the extent that this would allow the NIGC to require similar information as originally proposed, we strenuously object. Such requirements micromanage tribal government regulation and intrude upon the sovereign right of tribes to manage their own affairs and the land they govern.

Conclusion

Thank you for the opportunity to comment. We respectfully request that the NIGC extend the comment period to allow for meaningful comments from Indian country and that it reconsider publication of these regulations.

Sincerely,

Henrietta Massey

Henrietta Massey, Chairman
Sac and Fox Nation Gaming Commission

cc: Chairman Philip N. Hogen

Commissioner Chuck Choney
Commissioner Norm Des Rosiers
Penny Coleman, Acting General Counsel